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NOTES ON ADMINISTRATION OF JUSTICE.

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1. EQUILIBRIUM OF CLAIM BEFORE GOD.

We can best work out notions of Right, Justice, Duty, in terms of Balance, not in terms of Authority and Command. The start is with equilibrium. There are three factors, the two ends and the holder of the scales. The state of the two ends in equilibrium is Right; when equilibrium is disturbed, the state is Wrong. When there is disturbance of equilibrium, there is vibration until equilibrium is restored. Thus God wills the return to balance, and eventually restores it.

When the balance is disturbed, one of the ends is outweighed, he is wronged, a wrong is done him. As God wills that the balance be restored, one wronged has a claim before God to be restored to equilibrium; and a claim before God is a Right. Where there is equilibrium of conditions of continuance of life as between man and man, there is a condition in human relation called Justice. As God wills the restoration to balance, there is between man and man an obligation to restore called Duty. A thwarted Right gives rise to the vibration or desire to have the balance restored which is the source of evil motive.

The apprehension constant in consciousness that between a man and his neighbor there exists equality in claim before God constitutes a Sense of Justice. All voluntary action is to be limited by justice.

The morality of an act is to be determined by justice. To preserve the balance of the equilibrium of justice is a duty. A violation of justice is followed by retribution to God and to the wronged neighbor. To restore the balance to equilibrium is a duty. Claim to restoration is a right. That which one may demand of right is due. Thus Justice, Right, Duty and Due are moral concepts.

The State translates moral concepts into rules for human conduct, or laws. When the moral concepts are translated into rules by the state, the rules are moral; for no subject can question the authority or the omniscience of the State as the interpreter of the will of God. The function of the State is to preserve the balance of equality of claim before God. It accomplishes this when the balance is disturbed by exacting retribution to the State or to the person wronged, or to both. The exercise of this function by the State is the Administration of Justice.

Administration of Justice means Abstract or Moral Justice. The rules or laws which are formed and prescribed by the State are the State's interpretation of moral justice, and constitute the rules of fulfillment of moral justice in civil conduct. These rules are no less moral because they are differentiated and called Legal Justice or Law. According to the Institutes of Justinian 1, i, sec. i, 3, "Justice is the set and constant purpose which gives to every man his due." But it would seem that, from the failure of any reference to the holder of the scales, this set and constant purpose in human consciousness is acquired and not instinctive. Kant, Rechtslehre, xxxlll, introduces this third term: "Right is therefore the sum of the conditions under which the will of one can be brought into harmony with the will of another according to a universal law of freedom. Every act is right which, in itself, or in accordance with its maxim, can co-exist with the freedom of the will of each and all according to a universal law." Which may fairly be interpreted that where there are two individuals and freedom is absolute, right is in a standoff or balance between the two. Right, therefore, is a balance or state of equilibrium between the freedom of A and the freedom of B, value and worth being measured by the standard of the holder of the scales.

2. The Administration of Justice.

Consider these figures. (1) the elements (a) an administrator clothed with authority and power; (b) justice or equal balance as the standard; (c) an act of a human being affecting his neighbor. (2) Weigh the act in the scales of justice. (3) Measure the morality of the particular act by comparison with the abstract or general morality. (4) Ascertain the fact of disturbance, measure the degree of variation, and restore the balance by exacting retribution. Note that inequality and injustice are conditions of unrest and instability, and the whole economy of the universe will be brought to restore the equilibrium.

In the administration of Justice, there must be two separate authorities in the State: (1) To establish and declare the form of the Rules of Conduct: (2) To determine and enforce their applicability to particular situations. (Legislative and Administrative.)

The Legislative Authority prescribes the form of the Rule, but the Administrative Authority weighs the applicability of the Rule in the Form prescribed to the particular facts and, to that end, interprets the Rule.

The Administrator holds the balance and keeps it in Equilibrium. On one end is Abstract Morality (which includes the Legislative Form); on the other is the Morality of the particular act. The administrator is the Judge, and a State of Equilibrium is a state of Justice, or Rightness, or Righteousness.

3. The Common Law.

A state of Justice exists in the abstract, apart from and superior to the consciousness of the Judge, but he is the interpreter and spokesman; therefore, Right is in the breast of the Judge. The Judges under the Civil System are not subject to any control but their own consciousness; under the Common Law System the Judges are bound by a superior Morality, which is called the Common Law and is found in the Precedents and Maxims.

The term, the Common Law, has also a wider signification than in its application specifically to the English Law. In Salmond, Jurisprudence, 6th Edition, p. 45, these quotations are given:

Aristotle: "Law is either universal or special. Special law consists of the written enactments by which men are governed. The universal law consists of those unwritten rules which are recognized among all men." "Right and wrong have been defined by reference to two kinds of law. . . . Special law is that which is established by each people for itself. . . . The Universal law is that which is conformable merely to nature."

Gaius: "All people that are ruled by laws and customs observe partly law peculiar to themselves and partly law common to all mankind. That which any people has established for itself is called jus civile as being law peculiar to that state. But that law which natural reason establishes among all mankind is observed equally by all peoples, and is for that reason called jus gentium."

Justinian: "Natural law which is observed equally in all nations, being established by divine providence, remains settled and immutable: but that law which each state has established for itself has often changed either by legislation or by the tacit consent of the people."

Hooker: "The law of reason or human nature is that which men by discourse of natural reason have rightly found out themselves to be all forever bound unto in their actions."

Christian Thomasius: "Natural law is a divine law, written in the hearts of all men, obliging them to do those things which are necessarily conservant to the rational nature of mankind, and to refrain from these things which are repugnant to it."

Speaking of Natural Law, Salmond says, Jurisprudence, 6th edition, p. 45: "Natural Law has received many other names expressive of its divers qualities and aspects. . . . It is also the Unwritten Law, as being written not on brazen tablets or on pillars of stone, but solely by the finger of nature in the hearts of men. It is also the Universal or Common Law as being of universal validity, the same in all places and binding on all peoples and not one thing at Athens and another at Rome, as are the civil laws of states . . . lastly,

in modern times we find it termed the Moral Law, as being the expression of the principles of Morality." "The term law as applied to the principles of natural justice, brings with it certain misleading associations—suggestion of command, imposition, external authority, legislation—which are not in harmony with the moral philosophy of the present day."

But in the English and American system, the Unwritten, the Common Law, is that system of Justice and Morality which is found in the Judicial Precedents, Legislative Enactments, and Books of Authority of the English-speaking people.

4. Municipal Law.

It seems to be a false figure to apply the term Law to Morality at all. Certainly it has a different meaning when used in the expressions. "Moral Law," "Universal Law," "Common Law." "Unwritten Law," on the one hand, and "Municipal Law" on the other. In the last three is the suggestion of imposition by the strong hand, of command of a superior force, of legislation. None of these is consistent with a mere course of existence which is of the nature of the object affected. Therefore, extracts from Blackstone and other writers are to be read as using figures and modes of expression taken from imperialism, and not from the theory of a modern American state.

Blackstone's definition of Municipal Law, I Comm., 44-46, is applicable in the abstract. "A rule of civil conduct prescribed by the Supreme power in a state commanding what is right and prohibiting what is wrong." When a particular state is considered, the expression would be properly the Municipal Law. The Municipal Law is a body of Rules of Civil Conduct obtained in a particular state. The Municipal Law of Kentucky is that body of Rules of Civil Conduct which the people of Kentucky have ordained for their own governance.

A law is necessarily a Rule as set out by Blackstone; also, Municipal law applies only to civil conduct. Such a Rule has the character of a law only when it is ordained as such by the supreme power, and it is also necessary to its character as a law that it shall be notified

to the people subject to it. But apparently, he takes the view that a Law is a Command of the state; but it is to be noticed further that he defines Right and Wrong by defining the specific rights and wrongs which the state will consider in the administration of Justice.

Jenks, Law and Politics in the Middle Ages, points out that there are "Sources" of Law, or authority for law, other than the state's command.

Gray, Nature and Sources of Law, pp. 191-230, contends that the Law is composed of the rules which the Courts lay down for the determination of legal rights and duties. He cites Austin, "that the law is the command of the state." Savigny, that the courts apply those rules which have previously existed in the common consciousness of the people; and Carter, that the judges are the discoverers, not the creators of the law.

5. Positive Law.

Robertson, Elements of American Jurisprudence, p. 4, points out the difference between an essential order of being appearing in existence, and a command. "A rule may be imposed by one being upon another being in either of two ways (1) By immediately and irresistibly controlling the nature, attributes, or conduct of the subject-being; (2) By commanding the subject-being how to act or forbear. The latter mode is possible only when the subject-being possesses reason and will, and when its actions and forbearances are under its own control. Thus the eternal law governs all beings, actions and events, except the purely voluntary acts in the second method. To the imposition of a rule in the second method it is necessary that the rule should be expressed and promulgated; that is, that it should be positively prescribed and communicated by the law-giver to the rational subject-being in a manner intelligible to him and so become a recognized and practical guide of life and conduct. This form of law is known as a "Positive law and is regarded by many writers as the only form to which the name 'law' can be properly applied."

Illustrations of the first class of rules are, Water seeks its level; the peach falls; the wind bloweth where it listeth; sparks fly up-

ward. Of the second class are the Ten Commandments; the Twelve Tables.

Amos, Science of Law, 43-45, contends that law (what does he mean by the term?) does not and cannot cover the field of morality so as to be directly in furtherance of morality, but that it does further morality indirectly. Thus, law may create and define relations, but the observance of the duties of such relations is very largely under the sanctions of morality and not of law. Law does declare what agreement shall be enforcible, but that element in the obligation of agreement which we call character the law does not touch. But law does define the field with which moral agencies work. Thus it is the constant reminder to every man of the equal claim of his neighbor, and so restrains him.

Law does secure, moreover, according to Amos, to individuals "a free field" of undisturbed life and of work, that is, personal liberty. It is a guard against invasion of liberty that law exerts most effectually an influence in support of morality, since men cannot be moral unless they are free.

6. Free Field of Life and Work.

The "Free field of undisturbed work and life," in the phrase of Amos, is a very rich conception. Perhaps it can be elaborated into a field in which a human being is free of restraints and limitations upon the enjoyment of continued existence, and the exercise of his faculties and capabilities in the pursit of his own desires. The conception is that of Liberty. This conception can best be arrived at by considering the situation of a man caught in a cane brake. He cannot move; he perishes because he is killed by enemies, or cannot obtain food. But suppose he can move slightly in place; he enlarges the space in which he is free to move by cutting down the cane around him; he fences in the place he has thus cleared against enemies, and within it, he is free to move and seek his food. The cleared space is his liberty, because there he is secure. Thus Liberty is a space within which an individual or a society is free to move and enjoy continued existence. The physical expanse which we call Kentucky is the

Liberty of every citizen of Kentucky. Within that domain he is free to move and continue to live; this is his birthright. But his freedom in these respects is not without the limitation of the equal claim of every other citizen. His degree of freedom is that scheme of freedom which the members of the political society of Kentucky have devised and ordained for every citizen.

We have made the interior expanse of Kentucky comparatively secure against enemies of all sorts. But human beings and the individual claims and wills of human beings still exist and encompass and press upon the man like the stalks of cane. These he cannot cut down and clear out of his way; moreover, they are not stationary, but moving and elusive. The problem is to achieve and make secure to the man a liberty of moving and living which is consistent with an equal liberty of moving and living in the same space enjoyed by every other individual at the same time; where the freedom of moving and living at will of the one does not encroach upon the equal freedom of the other to move and live at will, both being in exactly the same situation. Thus it is, to devise a scheme of freedom of living and moving whereby two men may occupy the same space at the same time, yet each to be equally free to live and work.

If we dismiss the figure of a physical, geographical expanse and conjure up for contemplation an imaginary region, a field, where the hearts of numberless men are eternally at work imagining and devising, each pursuing its own designs and following its own desires, crossing and recrossing each other, coming into conflict or here and there proceeding in company, having each the grand objective to continue existence, and to that end to acquire for his own use as great a portion of the common available supply of food as possible, then we get a conception of the region which is made secure by fencing out enemies but yet has to be regulated within; where order has to be brought out of chaos. When order has been established and two men continue to live side by side and pursue their own hearts' desire without extinguishing each other, then that imaginary region of suspended conflict is the Liberty of the two men and their state is that of Civil Liberty. Each is

under restraint as to the indulgence of his liberty to move; but their state as respects the degree of absence of restraint is that of Freedom. In the state of Freedom, the liberty to move at will has become the liberty to move in zig-zags. A straight course being of right until another will and right are encountered, when the course must be veered at such an angle as may be necessary to avoid a clash.

Perfect freedom is the state of a man within his liberty who is not under any control or direction as to his movements except the "devices and desires of his own heart," that is, of a human being alone within a liberty of his own achievement, from which the obstacles of all other human wills are excluded. (Compare Robinson Crusoe.)

The radical idea in Liberty is an environment which is propitious towards the exercise by a human being of his capabilities; in Freedom, it is the absence of restraints upon the realization in action and achievement of the devices of his own heart.

7. The Restraint of Justice.

Under our system, life is given of God, and its continued existence is a right given of God. The right to continued existence imparts the right to be secure in person, and the right to exercise our capabilities in acquiring food and in improving our condition. But the right of continued existence, since the time when a state of Civil Liberty was established, has become modified by the requirement that its conditions shall be such as are consistent with Right Reason and with Justice; Right Reason being the ordained course or direction of Self-determination, and Justice being the ordained course, or line of direction of self-determination restrained within the requirements of the conditions of a state of Civil Liberty. A sense of Right, Reason and a sense of Justice are faculties in every human being, but not of equal power and development in all persons. It is necessary to have a standard of each by which to measure and test the morality of individual human actions. The state prescribes the standard for each action, and the state's prescriptions

we call laws. A legal right is that liberty of progressive existence, and of working, of moving and taking and holding, which results to the individual human being after the conditions of his life have been modified, and after the exercise of his capabilities has been restricted by limitations which arise out of the coexistence and contemporaneous enjoyment of the same conditions and the exercise of the same capabilities by other individuals. Thus every law is an authoritative declaration of the limits which reason and justice impose upon the liberty of exercising the natural capabilities.

The capability to move over the earth's surface at will was in the case of Robinson Crusoe, absolute in the exercise before the advent of Friday, but it was by no means absolute after that happening. After the appearance of Friday the exercise of the capability became a liberty; that is, it became a right or just claim, against Friday. Given a large space and only one other human being the rights of each can be easily worked out; perhaps, if the space is sufficiently large, there could be an apportionment. But if the space is common to many humans, then the moving leaves a tortuous trace behind. The same figure applied to the course of an individual's movements in the field of Civil Liberty pursuing his own devices and desires would exhibit the same tortuous track or wake. We can only speak of the tract or wake left behind, because there is no beaten path to follow, the man must feel his own way with tentacles out in front. His tentacles would notify him of frequent and numerous obstacles, which, instead of cane stalks, would be the equal rights and claims of his neighbor. Each right and claim of each neighbor demands of him an obligation of heed and regard. That obligation calls for a punctilious and constant bearing or course of conduct consisting in the exercise of solicitous care and forethought in avoiding such acts and doings, and such modes of acting and doing as will directly or consequentially cause unnecessary interference with the neighbor's right and in doing such acts or resorting to measures which will prevent unnecessary interference with the neighbor's right. This is, indeed, the essence of Civil Lib-

erty. The neighbor's right to security against him imposes upon him the duty to respect that security both by doing and by refraining from doing, and by modification of conduct.

8. Disturbance of Justice.

In prescribing what conduct shall be legally wrongful the law notices both voluntary actions and also omissions to act, the latter being, in some situations, evidence of a culpable mind. Acts which constitutes breaches of law are classified as, (1) wrongs, (a) crimes, (b) torts; (2) breaches of contract; (3) breaches of quasi-contractual obligations.

A wrong is an enlargement or expansion of the wrongdoer's liberty, or the improper assumption of a liberty, either in derogation of the liberty of another. It is wrongful in that according to the standard of the law, it is destructive of the peace and dignity of organized society, or of the security of another in the enjoyment of his rights of progressive continued existence, or of his rights of doing, taking and holding. In so far as a wrong is destructive of the peace and dignity of organized society, it is a "crime." Other wrongs are "torts." Breach of contract is a special form of unlawful act whose definition, form, and obligation are fixed by positive rule. There is no contract unless the definition is exactly fulfilled, and unless the prescribed form is observed and there is no other legal obligation than the one laid in the law. Breach of Quasi-Contractual obligation is a species of unlawful act similar in its nature to tort in that it is in derogation of another's right and similar in its nature to breach of contract, since it is a refusal to render a fixed sum of money under circumstances from which the law recognizes a right to receive that sum. It is of an equitable nature, in process of growth, and not yet fully reduced to definition and form.

9. The Justice of Law.

Municipal law consists of a body of rules of Civil Conduct whose obligation is enforced by a human sanction. Moral obligations are not enforced by any human sanctions prescribed by law. The sanction of the law is the restoration of equilibrium, that is, the performance of the obligation of Justice. The sanction of moral obligations is death. Eve was told that if she should eat the fruit, she would surely die.

Blackstone contends that no human law is a valid rule if it contradicts or be in conflict with the Moral law. But he does not contend that a subject is at liberty to disregard the law if in his conscience it violates the moral law. The individual is not the judge of what is the moral law as a standard by which to criticise the human law. That authority is exclusively in the state; in the Legislature as to positive enactments, and in the courts as to the Common law. But, there are limitations upon the power and authority of the state to impose restrictions upon the individual's conduct. Justice Miller points out in Loan Association of Topeka that certain limitations upon legislative authority exist and have their source in the essential nature of free government, such as in the United States. His position is that there is a sort of moral law of states which will be recognized by the courts. They will declare void such positive enactments as violate the essential nature of free government. And Coke declares that by the Common Law a positive enactment which is against common right and reason, or is repugnant in itself, or is impossible to be performed is void; as an enactment that a man shall be judge in his own cause. Lord Holt laid it down in City of London vs. Wood, that an act of the legislature can do no wrong, altho' ,h it may "do several things that look pretty odd." By which he mear that the fact that the law is unethical does not make it void, nor that it is oppressive and unwise or unmoral; but it will be void if it undertakes to do or bring about that which according to the eternal fitness of things it is impossible should exist, as that a man be judge in his own case.